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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Bluebonnet Nutrition Corp.

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Serial No. 75879167

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John S. Egbert of Harrison & Egbert for applicant.

John D. Dalier, Trademark Examining Attorney, Law Office 105 (Thomas Howell, Managing Attorney).

Before Quinn, Hohein and Holtzman, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Bluebonnet Nutrition Corp. to register the mark POWER-ZYMES for "dietary supplements."[1]

The trademark examining attorney refused registration on the ground that applicant's mark, if applied to applicant's goods, would so resemble the previously registered mark ENZYME POWER for "nutritional supplements

[1] Application Serial No. 75879167, filed December 23, 1999, based on an allegation of a bona fide intention to use the mark in commerce.

containing enzymes"[2] as to be likely to cause confusion under Section 2(d) of the Trademark Act.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs. An oral hearing was not requested.

Although conceding that both marks share the term "POWER," applicant points out that its mark combines this term with "ZYMES" and connects them with a hyphen, forming a coined term that, according to applicant, has a distinct commercial impression from the one of the cited mark. Further, applicant contends that the cited mark is "very descriptive," and that it should be afforded only narrow protection. (Brief, pp. 3-4). As to the products, applicant states that purchases thereof will be made only after careful consideration. Applicant asserts that where a consumer's health is at stake, a consumer has an innate care for what is placed in their body, and that "consumers are vividly aware of what they put into their body." (Brief, p. 7).

The examining attorney maintains that the goods are identical, and that the marks are similar in that both comprise the term "POWER" combined with the similarly

[2] Registration No. 2463104, issued June 26, 2001. The word "enzyme" is disclaimed apart from the mark.

sounding terms “ENZYME” and “ZYMES.” According to the examining attorney, applicant’s mark is essentially a transposition of registrant’s mark, and the marks convey similar commercial impressions. The examining attorney dismisses applicant’s contention that the cited mark is weak, pointing to the fact that the record is devoid of any third-party uses or registrations of similar marks in the field. Given the similarities between the marks and the goods, the examining attorney maintains that consumers would be confused even after careful consideration in purchasing the supplements.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also: In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also: In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Applicant, with good reason, does not dispute the relatedness of its "dietary supplements" and registrant's "nutritional supplements containing enzymes." When goods are broadly identified, as in the present case, it must be presumed that the identification encompasses all goods of the type described, that they move in all normal channels of trade, and that they are available to all classes of purchasers. See In re Diet Center Inc., 4 USPQ2d 1975 (TTAB 1987). Accordingly, applicant's dietary supplements must be presumed to include supplements containing enzymes. Further, such goods are presumed to move in the same channels of trade (e.g., drug stores, grocery stores, retail nutritional stores, etc.) to the same class of purchasers (ordinary consumers). For purposes of our likelihood of confusion analysis, therefore, the goods are considered to be legally identical.

Turning to the marks, we note at the outset that where the goods are identical, "the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1992).

Registrant's mark ENZYME POWER and applicant's mark POWER-ZYMES are similar in sound, appearance and meaning.

Applicant has essentially transposed registrant's mark, and employed the abbreviated "ZYMES" term in place of "ENZYME." The transposition and the shortened form of "ENZYME," not to mention the hyphenation, do not change the overall commercial impression of applicant's mark; rather, applicant's mark engenders the same overall commercial impression conveyed by registrant's mark, namely, that the supplements will supply or create powerful enzymes in the user's body. See, e.g., In re Nationwide Industries Inc., 6 USPQ2d 1882 (TTAB 1988) [RUST BUSTER (with "RUST" disclaimed) for rust-penetrating spray lubricant held likely to be confused with BUST RUST for penetrating oil].

In comparing the marks, we recognize their suggestiveness, but, as indicated above, the marks, when applied to the goods, convey the same suggestion.[3] Notwithstanding this suggestiveness, the record is devoid of evidence of any third-party uses or registrations of similar marks in the dietary and nutritional supplements

[3] At one point in its argument, applicant went so far as to characterize the cited mark as "very descriptive." Applicant is reminded that Section 7(b) of the Trademark Act provides that a certificate of registration on the Principal Register shall be *prima facie* evidence of the validity of the registration, of the registrant's ownership of the mark and of the registrant's exclusive right to use the mark in commerce in connection with the goods specified in the certificate. Applicant's contention that the registered mark is descriptive constitutes a collateral attack on the cited registration and is impermissible during ex parte prosecution. In re Dixie Restaurants, supra.

field. Further, even a weak mark is entitled to protection against the registration of a similar mark for virtually identical goods. King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Contrary to the gist of applicant's argument, the proper test is not a side-by-side comparison. See In re Majestic Drilling Company, Inc., supra. We recognize that there are differences between the marks that can be detected when they are viewed side by side. Under actual marketing conditions, however, consumers do not necessarily have the luxury to make such a comparison, but must rely on hazy past recollections. As often stated, in evaluating the similarities between marks, the emphasis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. Dassler KG v. Roller Derby Skate Corp., 206 USPQ 255 (TTAB 1980); and Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975).

We also are not persuaded by applicant's argument that likelihood of confusion is eliminated because consumers buy dietary and nutritional supplements only after careful consideration. Although users of supplements may be careful about what they are ingesting, any careful

purchasing decision is clearly outweighed by the factors of the identity of the goods and the similarity of the marks.

We conclude that consumers familiar with registrant's nutritional supplements containing enzymes sold under registrant's mark ENZYME POWER would be likely to believe, if they encountered applicant's mark POWER-ZYMES for dietary supplements, that the goods originated with or are somehow associated with or sponsored by the same entity.

Decision: The refusal to register is affirmed.